76-479

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1976

NO. ————

CAROLYN DIANNE ZACHRY ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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Petitioner Carolyn Dianne Zachry respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas in this proceeding, which judgment became final on July 6, 1976.

OPINION BELOW

The opinion of the Supreme Court of Arkansas appears in the Appendix hereto. It is reported at 260 Ark. 97, 538 S.W. 2d 25 (1976).

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on July 6, 1976. This petition for certiorari was

filed within 90 days of July 6, 1976. This Court has jurisdiction under 28 USC Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether Petitioner's federal right to due process of law was violated by the State's admitting into evidence, over Appellant's objection, a statement taken from Petitioner in violation of her constitutional rights.

2. Whether the Petitioner's right to due process of law was violated by the refusal of the State to advise the jury that an accomplice had been offered preferential treatment in exchange for his testimony against Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> nor shall any State deprive any person of life, liberty or property, without due process of law . . .

STATEMENT OF THE CASE

On the 8th day of January, 1975, at approximately 8:00 p.m. at the request of Charlie Bean, Curtis Eugene Zachry left his home in Ashdown, Little River County, Arkansas, to show real estate to Charlie Bean at his request. Charlie Bean and Curtis Eugene Zachry entered and rode in an automobile owned and being driven by Jimmie Lee Dyas. Upon arriving at a creek bridge in a remote area of Little River County, Arkansas, along a County Road, Charlie Bean pulled a gun, informed the driver to stop the automobile, and instructed Curtis Eugene Zachry to empty his pockets, and after Curtis Eugene Zachry had done this,

Charlie Bean told him to get out of the automobile. He and Charlie Bean emerged from the automobile. Curtis Eugene Zachry begged for his life and struggled with Charlie Bean in the roadway and down the embankment. Charlie Bean shot Curtis Eugene Zachry at least nine times with a .25 caliber pistol — emptying the pistol. Charlie Bean then entered the automobile with Jimmy Lee Dyas and they drove in a southerly direction along this county road a short distance. Charlie Bean then obtained from the automobile a .38 caliber pistol belonging to Jimmy Lee Dyas and instructed Dyas to turn around and drive back to the death scene. He then shot Curtis Eugene Zachry with the .38 caliber pistol to be sure that he was dead.

Bean and Dyas then left the scene and traveled in a southerly direction to U.S. Highway 71 at Ogden — a short distance north of the Index Red River Bridge. Just south of the death scene, Bean threw the shoes and some other personal belongings of the deceased into a creek. While crossing the Red River Bridge toward Texarkana, Bean threw the wallet and some other items belonging to the deceased into the Red River.

During the early morning hours of the next day — the 9th day of January, 1975, — Albert C. "Red" Moore found the body of Curtis Eugene Zachry in the remote area where he was killed. The investigation by local law enforcement officials was immediately conducted.

Petitioner was taken into custody at the Texarkana, Arkansas Police Station on January 21, 1975, where she gave a statement that was later introduced into evidence at her trial. An Information was filed against Petitioner by the State charging her with the crime of Capital Felony Murder, in violation of Arkansas Statutes §41-4702(a),

§41-4711, and §41-2205. She was arraigned in open court on the 23rd day of January, 1975, and entered a plea of not guilty. A jury trial was held and on the 12th day of April, 1975, a verdict of guilty was returned by the jury and Petitioner was sentenced to life in prison without parole. Before the trial of the case, Petitioner filed a Motion to Suppress the Statement Given by Petitioner on January 21, 1975. (TR. 19) A hearing was held on same and Petitioner's motion was overruled. (TR. 203) During the course of the trial Petitioner made timely objection to the State's refusal to advise the jury that an accomplice had been offered preferential treatment in exchange for his testimony against Petitioner and said objection was overruled by the court. (TR. 643) An appeal was prosecuted through the Supreme Court of Arkansas and on July 6, 1976, the verdict of the trial court was affirmed by the Arkansas Supreme Court. It is the contention of the Petitioner that her constitutional rights to due process of law were violated and she therefore seeks review by this Honorable Court.

REASONS FOR GRANTING THE WRIT

1. Uncontroverted testimony at the trial of this case revealed that during the time police officers were taking Petitioner Carolyn Dianne Zachry's statement on January 21, 1975, the same police officers were "sympathetic" with the Petitioner. (TR. 520) The State's own witness testified that during the time the statement was taken the Petitioner broke down and cried. (TR. 526-528) There was also testimony to the effect that Petitioner did not know she was a suspect, but thought that she was being taken to the Municipal Building in Texarkana, Arkansas, to view "mug shots." (TR. 535) Testimony during the trial of this

case also indicated that Petitioner may have been under the influence of sedating drugs and was to see a doctor and perhaps go to the hospital the day her statement was taken. (TR. 524-527, 537-538, 553-556)

Petitioner testified during the trial that she had requested counsel during the time her statement was taken by police officers, and uncontroverted evidence showed she did seek counsel immediately after her statement was taken. (TR. 545)

Testimony further revealed that Petitioner was approached by other officers while waiting to be interrogated, and her position regarding the murder discussed with those officers without benefit of any warning that anything she might say could be used against her. (TR. 538-542)

Petitioner testified during the trial that she did not know she was being asked to give a statement. (TR. 539) Petitioner further testified at the trial that she did not read the statement or the Waiver of Rights in connection therewith; in fact, that she (Petitioner) gave what the State contends was a statement before the signing of the Waiver of Rights. (TR. 538, 539, 547, 856-857)

Uncontradicted testimony by Petitioner during the course of the trial indicated that a police officer threw a tape on a table in front of Petitioner while she was being interrogated and that the officer informed Petitioner that the State had the whole story and requested that Petitioner tell them something that would help her. (TR. 857-858) The uncontradicted testimony of Petitioner was that she was told by officers that she was not being charged as a principal, but as an "accessory". She did not know the meaning of the term. (TR. 856-857)

As early as *Spano v. New York*, 360 U.S. 315 (1960), the United States Supreme Court recognized that an accused could be improperly influenced by sympathy into giving a statement contributing to his conviction. Events having a psychological impact upon an accused have also been considered by the United States Supreme Court as being coercive and inadmissible under the due process clause of the Fourteenth Amendment. *Watts v. Indiana*, 338 U.S. 49 (1949).

Testimony by police officers in this case attempted to show that the accused "voluntarily, knowingly and intelligently" waived her Constitutional Rights, as elaborated in *Miranda v. Arizona*, 384 U.S. 436 (1965), by signing a Waiver of Rights form; however, it has been held that the mere signing of a form does not conclusively indicate an effective waiver. *Blyden v. Hogan*, 320 F. Supp. 513 (DC NY 1970); *United States v. Blocker*, 334 F. Supp. 1195 (DC Dist. of Col. 1973). An accused may also be too emotionally upset to effectively waive his constitutional rights during interrogation by police officers. *Sample v. Eyman*, 469 F. 2d 815 (9th Cir. Ariz. 1972); *Lowery v. State*, 286 So. 2d 62 (Ala. 1973); *People v. Golwitzer*, 52 Wis. 2d 925, 277 N.Y.S. 2d 209 (1966).

In *Watson v. State*, 255 Ark. 631, 501 S.W. 2d 509 (1973), the Arkansas Supreme Court stated that for some time it had been committed to an independent determination of the voluntariness of a confession based upon an examination of the entire record whenever an attack is made upon federal constitutional grounds. See also *Dewein v. State*, 114 Ark. 472, 170 S.W. 582 (1914). This Court has also held that all doubts about voluntariness of a confession must be resolved in favor of individual rights and constitutional safeguards. *Smith v. State*, 240 Ark. 726, 410 S.W. 2d 749 (1966).

This was not a statement. It is admitted by the officers participating that the so-called statement was nothing more or less than a summarization in the handwriting of the officer taking the statement of what he thought she might have said. (TR. 507) It is uncontradicted, and definitely established, that the so-called statement could not have been the statement of the Petitioner because the summarization of the police officers of the so-called statement is to the effect that the Petitioner stated that she delivered $5,000 to Monroe Lindsey. (TR. 564-568) The uncontradicted testimony clearly reveals that the Petitioner delivered no money to Monroe Lindsey. (TR. 861) Carolyn Dianne Zachry is supposed to have said in this statement that she delivered $1,000 in an envelope and left it in her automobile at a beauty shop for Charlie Bean, and that the money was gone when she returned to the automobile. (TR. 564-568) Even the murderer, Charlie Bean, testified that he obtained the money from Bessie Tolleson, Carolyn Dianne Zachry's mother, in front of the K-Mart Store. (TR. 698-699) Carolyn Dianne Zachry in this statement allegedly said that Charlie Bean, the confessed murderer, came to her house and picked up $200. (TR. 566) The testimony of the State's own witness, Charlie Bean, stated that he met the Appellant and her mother, Mrs. Bessie Tolleson, out near Millwood Lake where the Appellant wrote a check for $200 to her mother, which was endorsed and delivered to Charlie Bean, and later cashed by Charlie Bean's wife. (TR. 663) These are just a few examples to conclusively reveal that the Petitioner gave no statements to the officers in Texarkana on the 21st day of January, and that the biased and prejudicial summarization by the

officers was so far off base that it constituted nothing. Even the Prosecuting Attorney advised the Court and jury that part of the statement was true and part of it was false. (TR. 560) That made no difference — the court permitted the falsity of a police officer to be introduced as a statement of the Appellant to be considered by the jury. (TR. 560-561)

We can find no cases involving the introduction of a statement before a jury where the party offering the statement advises the court and the jury that part of it is false. The jury had no earthly way to know what part was true and what part was false, if any of it was true. Again we must emphasize that there was no statement — just a summarization of a police officer over the signature of the Petitioner, and this police summarization was established by State witnesses beyond a reasonable doubt that most of the summarization was false.

In this instance, the jury was told that part of the statement was true and part of it was false, and over the objections of the Petitioner the court instructed the jury to look it over and give it the consideration the jury believed it to be entitled. (TR. 560-561) In other words, the jury was told to guess and speculate upon each statement attributed to the defendant — even though summarized by the police officers — and come up with whatever they cared to conclude to be true or false, right or wrong. The jury might as well have been instructed to guess at a determination of the truthfulness or falsity of each of the police summarized phases of the statement attributed to the Petitioner. The jury was left with a gamble after being told by the Prosecuting Attorney that part of the statement was false. Under the circumstances heads or tails on the flip of a coin by the jury, concerning each phase of the so-

called statement, could have been as good as any method to resolve same.

2. Attorney for the Petitioner knew that a deal had to have been made with the cold-blooded contract murderer, Charlie Bean, in order to gain his testimony against himself and others. Of course, Charlie Bean knew his fate before he testified. The following constitutes just some of his contradictory statements:

> Q. In other words, I gather, Mr. Bean you have made a deal?
>
> A. I am here of my own free will and accord.
>
> Q. Yea, on a deal?
>
> A. No sir, no, I have made no deal.
>
> Q. You have been assured that you are not going to the electric chair, am I correct?
>
> A. No sir. (TR. 641)

Here comes the first change in his testimony concerning the subject matter through the helpfulness of the Prosecuting Attorney:

> Q. All right, sir, now Mr. Bean, in order to set Mr. Tackett straight on the problem that he has brought up, I would like to ask you, sir, have I made you any offer or any kind of a deal, as he puts it?
>
> A. No one has.
>
> Q. Mr. Bean, have I, in fact told you that if you testify in behalf of the State in this case, or I should say, even if you testify — Let me begin again, Mr. Bean. Have I told you, sir, that if you do testify in behalf

of the State and if you come into this courtroom and throw your hands up and say, 'I'm guilty, and I want to tell the truth about this matter,' then I would take it into consideration. Did I not tell you that?

A. That you would take it into consideration, yes sir.

Q. All right, Mr. Bean, did I further tell you that regardless of what you did under no circumstances would I ever recommend to any court that you get less than life in prison?

A. That's true.

MR. BOYD TACKETT, SR.: Why, Your Honor, I will admit that. That's the deal that's been made. (TR. 642)

THE COURT: Do you have an objection to make?

MR. GEORGE STEEL, JR.: If that's a deal, Judge, it's just a deal. That's what has happened.

THE COURT: Well, let's don't have any comment about it. If there is an objection to the question, I will rule on it. If there is not, let's proceed with our questions.

MR. BOYD TACKETT, SR.: I object because of this very statement that the Prosecuting Attorney has already made and that is to the effect that the man is not going to the electric chair even though he shot and killed a man.

THE COURT: Objections overruled, go ahead.

Q. Mr. Bean, have I ever told you that you would not go to the electric chair?

A. No, sir. (TR. 643)

After the murderer testified that the Prosecuting Attorney would take into consideration his penalty if he testified in this case, that turns out not to be strong enough for the Prosecuting Attorney, and, therefore, that story was changed as follows:

Q. Now, Mr. Bean, did you then ask me that night, or do you recall — if you don't recall, just say you don't recall. Did you ask me whether or not it would be possible to have some consideration if you were to tell the whole story at that time?

A. I did, sir.

Q. Did you ask me if I would be able to show any mercy for you if you would tell the whole story right then?

A. I asked you that, yes, sir.

Q. And, Mr. Bean, what was my answer to that question?

A. You said that you could not. (TR. 645)

Q. Mr. Bean, have I ever told you that you would not go to the electric chair?

A. No, sir. (TR. 643)

Later, the cold-blooded contract murderer further testified:

Q. What kind of a deal that makes you so anxious to testify against this lady after you killed somebody?

A. I have made no deal with no one. (TR. 749)

In one breath he testifies that he has gained the assurance of the Prosecuting Attorney that there will be

consideration given him if he testifies in this case. In the next breath he testifies that the Prosecuting Attorney has offered him no less than life. In another breath he testifies that he has not even been assured that he will not go to the electric chair. We can't blame him. He was staying out of that electric chair where he knew he belonged. No deal?

Why, his Attorney knew there was a deal because he went on a fishing trip during these trials, and gave the matter no consideration. Another reason for the fishing trip is because he did not want to tell about him, his murderer client, and Sergeant Carroll Page begging her to fire Boyd Tackett and hire him, and the great promises he made that because of his friendship with the Governor he could have her on the streets in 21 months. Then, he didn't want to be called upon during the trial concerning the deal he had made for Charlie Bean.

The Prosecuting Attorney is just as easy to change his mind. He first elicited an answer from the murderer that the Prosecuting Attorney would take into consideration the helpfulness of the murderer in the trial of this case. Now listen to this further elicitation of the Prosecuting Attorney:

> Q. All right, Mr. Bean, did I further tell you that regardless of what you did under no circumstances would I ever recommend to any court that you get less than life in prison?
>
> A. That's true. (TR. 642)

Does this sound like a deal had been discussed by the contract murderer and the Prosecuting Attorney? That is exactly the penalty that Charlie Bean received after he caused Petitioner Carolyn Dianne Zachry and Jimmy Lee

Dyas to receive worse punishment than the electric chair — life in confinement without parole. Now that is something. Giving a cold-blooded contract murderer less time than his driver of the automobile — Jimmy Lee Dyas. If there was ever a man who should have been electrocuted, it is Charlie Bean.

That didn't sound too good — sounded like a deal of life in prison — therefore, here comes the kicker to fool the jury:

> Q. Mr. Bean, have I ever told you that you would not go to the electric chair?
>
> A. No, sir.

Perhaps Damon Young is engaged in fulfilling his promise to Carolyn Dianne Zachry and Charlie Bean when he conferred with them at the jail in Nashville with Sergeant Page — 21 months and you will walk the streets.

Petitioner contends that the credibility of the State's witness, Charlie Bean, is an important issue in this case, and that the State should have been required by the trial judge to disclose the plea bargaining deals made with Charlie Bean and Attorney Damon Young in return for his testimony against the Petitioner.

No jury would have convicted Petitioner Carolyn Dianne Zachry and Jimmy Lee Dyas and assessed their punishment at life in prison without parole had the jury known that the cold-blooded contract murderer would get simple life with Damon Young at the helm utilizing his friendship with the Governor to allow this fellow to walk the streets in a few days.

The undisclosure by the State prejudiced Petitioner at the trial of her case, and violated the Due Process Clause

of the Fourteenth Amendment to the Constitution of the United States. A case just exactly like this one is the case of *Favor v. Henderson,* W. Dist. of La., No. 17,628-S, 1973. That case reached the United States Court of Appeals, but we cannot find the Court of Appeals decision. Other cases in point are *Brady v. Maryland,* 373 U.S. 83 (1963); *Smith v. Urban,* 245 Ark. 783, 509 S.W. 2d 309 (1968); *Giglio v. United States,* 405 U.S. 150 (1972); *Chapman v. California,* 386 U.S. 18 (1967).

The Prosecuting Attorney's refusal to disclose or acknowledge to Defendant, her Attorneys, or the jury that the State's witness, Charlie Bean, had been offered or would be afforded a lesser sentence for his testimony against the Defendant is reversible error. The United States Court addressed the issue in such a situation in the landmark case of *Mooney v. Holohan,* 294 U.S. 103 (1935), wherein the Court stated that such actions which have occurred in this case may be grounds for finding the Defendant's right to a fair trial violated, and to authorize the federal courts to grant writ of habeas corpus. This Court said in part that if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate decision of the court and jury, the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. Oh, yes, had the jury known of Charlie Bean's deal there would have been no conviction of Carolyn Dianne Zachry until after that fellow received at least the same punishment as would the Petitioner. The jail was actually too good for Charlie Bean, but he was curried, looked after by Sergeant Page and his cronies, and assured that he would be walking the streets in a few days.

The United States Supreme Court extended its ruling in the *Mooney* case, supra, to include any suppression of evidence by the Prosecution favorable to the accused where the evidence is material either to guilt or "punishment". In the case of *Brady v. Maryland,* supra, the Court held such conduct on the part of the prosecuting to be violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The United States Supreme Court addressed itself to the issue of a promise of leniency by the Prosecuting Attorney's office to a conspirator in an offense it was prosecuting, the co-conspirator being the only witness linking defendant to the crime. The co-conspirator was promised by one prosecutor, who filed an affidavit to that effect that he would not be prosecuted. Although the Prosecuting Attorney's office said that the prosecutor making that promise had no authority to make it, the Court held:

> In the circumstances as shown by this record, neither the Prosecutor's authority nor his failure to inform his superiors or his associates of the promise is controlling. Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The Prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. Id.

The Court noted in this case that the credibility as a witness of the co-conspirator was an important issue in the case

(since his testimony was depended upon almost entirely by the Government to establish its case) and evidence of any understanding or agreement as to a future prosecuting would be relevant to his credibility and the jury was entitled to know of it. *Giglio v. United States*, 405 U.S. 150 (1972) — (Court held nondisclosure violated due process requirements).

In *Chapman v. California*, 386 U.S. 18 (1967) the United States Supreme Court enunciated the "harmless error rule" as follows:

> Before an error involving the denial of a federal constitutional right can be held harmless in a State criminal case, the reviewing Court must be satisfied beyond a reasonable doubt that the error did not contribute to Defendant's conviction. Id.

By the State assisting to keep Monroe Lindsey off the witness stand, and precluding his statement from being brought to the attention of the jury, was most prejudicial to the Petitioner. The State knew the statement from Monroe Lindsey would ruin the possibility of conviction in this case. It will be noted that Monroe Lindsey was jailed, even though he was never prosecuted, in order to keep him away from the public and his knowledge of the true involvements disclosed.

CONCLUSION

Based on the foregoing, Petitioner earnestly contends that the Writ of Certiorari should be granted to review the judgment of the Supreme Court of Arkansas. On plenary consideration, that judgment should be reversed and the cause remanded for new trial.

Respectfully submitted,

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Appendix

In The Supreme Court of Arkansas

No. CR 75-131

CAROLYN DIANNE ZACHRY, *Appellant* vs. STATE OF ARKANSAS *Appellee*	Opinion Delivered: July 6, 1976 Appeal from Little River County Circuit Court HON. BOBBY STEEL, *Judge* *Affirmed.*

CARLETON HARRIS, *Chief Justice*

Appellant, Carolyn Dianne Zachry, was charged with capital felony murder in the robbery-slaying of her husband, Curtis Eugene Zachry. She was found guilty by a jury, which sentenced her to life imprisonment without parole. From the judgment of conviction so entered, Mrs. Zachry brings this appeal, arguing seven points for reversal.

Appellant first contends that "there was insufficient evidence upon which to base a jury verdict and court judgment finding appellant guilty of capital felony murder."

Appellant's husband, Curtis Eugene Zachry, was found dead from gunshot wounds on the morning of January 9, 1975; he had also been robbed. As a result of subsequent police investigations, appellant was taken into custody at the Texarkana police station on January 21, 1975, and she gave a statement, written down by state policeman James Lester, that was introduced into evidence at her trial. In this statement, appellant first mentioned

indignities that she had suffered during the last few years of her marriage, referring to being forced to engage in oral sex, constant beatings, and the fact that Zachry would not allow her to visit her parents. Zachry, however, was unwilling to let her obtain a divorce, and in October, 1974, she contacted Monroe Lindsey by telephone, telling him that she wanted to "get rid" of her husband and inquiring what it would cost. According to appellant, he answered that he would have it done for $5,000 and she met him about a week later and gave him this amount in cash. Subsequently, some few weeks later, when nothing had been done, she again reached Lindsey and he told her that the person that he had contacted had "skipped" and that she would have to come up with some more money. Mrs. Zachry said she was contacted by a man named Lumpkin and that this man told her he would kill her husband for $5,000 (Lumpkin said that Lindsey had talked with him), but that she told him to "forget about it." According to appellant, in the early part of December, 1974, she was contacted at her home by Charlie Bean, who came to her home alone. She said that Bean told her that he would take the contract for $5,000 and would not have to be paid until after her husband had been killed. Appellant stated that she replied that she needed a few days to think about it, and about a week later offered to pay him $200.00 to "forget it," but that Bean insisted on going through with the job. She said that he came to her house, got the $200.00, another heavyset man with gray in his hair, being with him; that Bean told her that she could not "get out of the deal" and that the killing would be accomplished on Christmas Eve; however, she stated that she talked him out of killing her husband on Christmas Eve.

Appellant said that on January 8, 1975, around 7:30 p.m., the telephone rang and a man asked for "Eugene", her husband. She called the latter to the telephone and heard him advise the party on the other end of the line that he would see him after he was dressed. Thereafter, Bean (she did not see him but recognized his voice) came to the house and her husband advised that he was going with this man to buy some land and kissed her. "Eugene left with the man and I knew what was fixing to happen."

After about three hours, she called Herb McCandless, her husband's business partner, and told him that Eugene had not returned and that she was worried. McCandless called the police and the next morning she was advised by the Chief of Police that her husband had been killed. Mrs. Zachry stated that she received a call from Charlie Bean during the afternoon, was told that if she opened her mouth, "she would get it too" and Bean said that he needed $1,000. She told him that she would leave this amount in her car at Chez Sue Beauty Shop and that she did leave this amount of money in an envelope in an automobile; when she returned to her car, the money was gone and she had not since been in contact with Charlie Bean.[1]

At the trial, the State also produced witnesses whose testimony confirmed appellant's statement about payments to Lindsey and Bean. Bill Brown, President of the Bank of

[1]In a second confession, written by Mrs. Zachry on February 1 and 2, she went into much greater detail (26 pages), and with reference to the $1,000.00, said that she had given it to her mother to give to Bean. She also stated in this second confession, and contended on trial, that her mother, Mrs. Bessie Tolleson, had instigated the plan to murder Zachry, and that her own subsequent statements were attempts to "cover" for her mother. However, she could not give any reason why her mother would have wanted Zachry killed. In addition, she said in both the second statement, and at the trial, that Bean intimidated her into silence by threatening to kill her and the children.

Ashdown, testified that appellant borrowed $2,000.00 from his bank on October 29, 1974, taking the proceeds in cash. Ms. Mary Lou Moore, an employee of First Federal Savings and Loan Association in Ashdown, testified that on the same date appellant made a withdrawal of $3,244.55, taking the proceeds in the form of two checks only after being informed that she could not have them in cash. Likewise, the $200.00 check, endorsed and apparently cashed by Charles Bean's wife, Frances Bean, was introduced; an officer of the Ashdown bank testified that after it had been cashed appellant came to the bank and picked it up personally, rather than letting it clear through normal channels.

William ("Big Bill") Lumpkin, Sr., also testified for the State. Lumpkin said that appellant asked him, in December, 1974, to kill her husband or to find someone who would do so, offering him a total of $5,000.00. Lumpkin stated that he told appellant "I would see if I could find someone." Lumpkin also testified that appellant told him that she had paid Monroe Lindsey $5,000.00.

The State's chief witness was Charles Watson Bean, the admitted killer of appellant's husband. Bean was arrested on January 21, 1975, and gave his statement to police that day. At the trial, Bean testified that he met appellant in December, 1974, near her house, and that appellant told him that she had paid Lindsey $5,000.00 to "do it," but that Lindsey was not going to "do it." Bean stated that he "told her that I would see if I could get it done for her," and that she told him "to proceed to do it immediately." Bean "was to be paid $5,000.00." He said that he and appellant had other meetings to discuss the planned killing, and that appellant even offered to let him kill Zachry in their home, showing Bean through the house, but Bean said that he told her "there was no way that it could

happen with children there or in the house. And she said she would try to make arrangements to have the children at her mothers house, and at this time, it was beginning to be urgent — just wanted it to happen that night." According to Bean, "Dianne kept asking that it just happen as soon as possible."

Bean testified that he requested Jimmy Lee Dyas to help him kill Zachry, but that when appellant could not pay the $5,000.00 before the murder occurred, he and Dyas agreed to go ahead and carry out the "contract" for $10,000.00 to be paid after Zachry's death. When Bean met again with appellant, he "asked her that if she would give me $100.00, then that would more or less close the deal and would involve her as well as me in case she decided to put me on the spot. After she had paid $100.00, she would have been as involved as much as I would. She didn't have a hundred dollars on her, so she said, 'I can give you a $200.00 check.' " At Bean's request, Mrs. Zachry made the check out to her mother, Mrs. Tolleson, who then endorsed it. Bean testified positively that appellant never indicated that the $200.00 was a payment to abandon the killing, but to the contrary she was anxious for the plan to be carried out, stating at one point that if Bean did not hurry and do it, she would kill Zachry herself.

Bean stated that he and Dyas drove to appellant's house on the afternoon of January 8; sitting in a car in appellant's driveway, they had just begun to converse with appellant about their plans when "she noticed that her father-in-law was over at the place of business just east of her house .... she asked that we leave that he would probably come in there and we did meet him halfway out of the driveway." (The State also called the father-in-law, Loyce Zachry, who testified that he saw Bean and Dyas at appellant's house on

January 8; when he asked her who the men were, appellant told him "that's two tile men from Texarkana" looking for her husband, and "then she changed the subject right quick.") Bean said that in this conversation they told appellant "we were going to try to do it that night"; at no time did appellant ever ask them not to kill her husband. Bean also stated that appellant told him and Dyas that her husband "usually carried a lot of money on him and that she wanted it to look like robbery or thought that would be the best thing and that we were to keep his rings if that were true as part-payment of doing it."

Continuing with his testimony, Bean said that he and Dyas drove in Dyas' automobile, to the Zachry home on the night of January 8, and persuaded Zachry to accompany them by pretending interest in buying some real estate listed with Zachry's agency. After driving to a remote location in Little River County, one of the men told Zachry to empty his pockets, that he was being robbed, and then asked him to get out of the car. Bean said that both he and Dyas were armed, but that Zachry charged at him; in the scuffle Bean emptied his pistol into Zachry. After the fight he shot Zachry one more time, with Dyas' pistol. The men then took Zachry's jewelry and money and drove back toward Texarkana. They stopped once, Bean said, when he called appellant and told her we had done what we agreed to do and she asked me how long it would be before she should notify them and I told her just to use her own judgment."

Bean said that he called appellant several days after the killing "and asked her when she was going to have some money for us, and she said she would have a $1,000.00 for us if that was all right." Bean later met appellant's mother at a Texarkana K-Mart store and received a thousand dol-

lars in cash in an envelope. Bean lost $200.00 of this payment, which apparently fell from the envelope in his car, but he split the remaining $800.00 with Dyas. (The State produced a witness, Bill Brown, President of the Bank of Ashdown, who corroborated that appellant had given his bank a note for $1,500.00 on January 16, 1975, putting the proceeds in her checking account; on the same day appellant wrote and cashed an $850.00 check in a Texarkana bank.)

McCandless, after receiving the call from appellant that her husband was missing, with a man named Eddie Woodruff, began a search for Zachry. Appellant had also called Albert C. Moore, owner of a fishing camp near the scene of the killing, telling him that her husband had been gone for 18 hours, that she was uneasy about him, and according to Moore, asked him to check around camp to see if he had been down there. Moore discovered the body early on the morning of January 9. It is apparent that the evidence offered by the State was more than sufficient to justify the jury reaching its conclusions.

It is asserted that the court erred in admitting into evidence the statement referred to under Point 1, said statement being a violation of her constitutional rights. We do not agree. The trial court held extensive hearings on the admissibility of this statement, given by appellant at the Texarkana police station on January 21 and written down by State policeman James Lester, and ruled that it was admissible. Appellant's version of the events that transpired before and during the time the statement was given conflicted with the testimony of every other witness, and was not corroborated by any other witness. Appellant's attack on the voluntariness of the statement is based on allegations that an unknown police officer at the station

told her that she might be prosecuted only as an "accessory", which she interpreted to indicate some lesser degree of culpability; that she was not advised of her constitutional rights until after she gave the statement, and that she was under the influence of drugs when the statement was given.

Sheriff Marlin Surber, who took appellant to the station, testified that he stayed with appellant during most of the time that she waited for questioning (a period that he estimated as no more than 30 minutes), and that he never heard anyone mention the term, "accessory", to appellant. Appellant herself testified only that she was listening to a conversation among some unidentified officers, and "I asked them when I overheard the conversation if we were being charged with an accessory, and he said, 'Yes, ma'am, I believe so.' " Appellant also stated that she had gone to a doctor the previous night, and had received a shot and some pills to help her relax, and that she was still "drunk" from this medication when she gave the statement the next day. No doctor corroborated this statement, nor was there any testimony about the identity of the drugs in question or their effects.

Both James Lester and Danny Sewell, the interrogating officers, testified that appellant was fully apprised of her constitutional rights before the statement was given, and that they also told her that she was a suspect in the homicide, Appellant signed a rights form, introduced at the hearing, that shows that the officers informed her of her rights at 10:30 a.m., before the statement was taken. Neither of the officers noticed anything abnormal about appellant's condition, and both testified that she became upset only when they told her at the beginning of the interview that she was a suspect. Lester and Sewell also said that appellant never asked for an attorney, and that

she never indicated that she wanted the questioning to cease.

The statement itself shows that it was taken in an interview that began at 10:30 a.m. and concluded at 11:45 a.m. and was signed by appellant, who initialed each page and every correction. Appellant herself admitted that the statement accurately reflected what she told the officers.

In reviewing a trial court's ruling on the admissibility of a statement by a defendant, this Court makes an independent determination based on the totality of the evidence, but reverses the trial court only when its ruling is clearly against the preponderance of the evidence. *Degler v. State,* 257 Ark. 388, 517 S.W. 2d 515. There is no question but that the preponderance of the evidence sustains the trial court's decision.

Appellant asserts that the State's case rested wholly on the testimony of two accomplices, Charles Bean and Bill Lumpkin, and that the State failed to adduce sufficient independent evidence to sustain appellant's conviction. This point obviously repeats appellant's first contention, that the evidence was insufficient, and does not merit extended discussion.

In the instant case, as appellee points out, the State presented undisputed proof that the crime was committed, establishing the *corpus delicti.* Appellant made a voluntary statement on January 21, identifying herself as the perpetrator of the plan to kill Zachry, and detailing the circumstances under which she acquiesced as her husband left their home on January 8 with Bean and Dyas. The State documented the bank transactions by which appellant obtained the sums of money involved in the scheme. Zachry's father testified that he saw appellant talking with

two men on the afternoon of the day of the killing, and further stated that when he asked about the men, appellant said they were two "tile" men and quickly changed the subject.[2] After the killing, appellant called Moore, who lived in the area where she knew that Bean and Dyas had taken her husband, and asked him to look for Zachry in that area. She also told the sheriff that she thought her husband had been robbed, but she made absolutely no mention of Bean, Dyas or Monroe Lindsey.

The applicable rule of law is well established. "The test of sufficiency of corroboration has been stated to be whether, if the testimony of the accomplice is eliminated from the case, the testimony of the other witnesses be sufficient to establish the commission of the offense and the connection of the accused therewith." *Prather v. State,* 256 Ark. 581, 509 S.W. 2d 309. There is no question in this case but that the State presented sufficient evidence to establish the commission of the offense, and appellant's connection therewith, even if the testimony of Lumpkin and Bean is eliminated.[3]

It is asserted that "The Court Erred In Permitting The State, Over Appellant's Objection, To Cross-Examine The Defendant-Appellant From A Statement Illegally And Unconstitutionally Obtained and Ruled Inadmissible."

Appellant, while confined in the Howard County Jail, also wrote a 26 page narrative statement (previously

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[2]The witness subsequently identified the two men as Bean and Dyas.

[3]Actually, with respect to Lumpkin, it is questionable that he was an "accomplice". The record does not reveal that he was charged with any offense, nor does it indicate that he committed any overt act toward carrying out a conspiracy. This Court pointed out in **Johnson and Keeling v. State,** 259 Ark. —— (May 24, 1976), "the burden is on the defendant to show that a witness is an accomplice."

mentioned in a footnote) on February 1-2, 1975. Although the trial court held that this statement was also admissible, the State elected not to use it in its case-in-chief. When appellant testified in her own defense, however, the trial court permitted the prosecuting attorney to cross-examine appellant about the February 1-2 statement, as a prior inconsistent statement, and afforded appellant an opportunity to explain any discrepancies. The trial court refused to allow the prosecuting attorney to introduce the entire statement at that point because the State had rested its case without proffering it.

It should first be noted that under the standard of *Degler v. State, supra*, the February 1-2 statement does not appear to be inadmissible. Appellant testified that she wrote the statement only because she received promises of leniency and favorable treatment from a State policeman at the Howard County jail, but the policeman, Sergeant Carroll Page, denied that he had made any promises. The trial court's decision that the statement was voluntary does not appear contrary to the preponderance of the evidence. Of course, no error could arise from cross-examination about an admissible statement.

Even if it is conceded, *arguendo,* that the statement was involuntary and inadmissible, this Court has previously rejected a contention identical to appellant's argument, in *Rooks v. State,* 250 Ark. 561, 466 S.W. 2d 478, a decision premised on *Harris v. New York,* 401 U.S. 222. Therefore, even if the statement had been inadmissible, the trial court committed no error by permitting the State to use it in cross-examining appellant.

It is next contended that the court erred in refusing to give appellant's requested instruction on conspiracy.

Appellant requested an instruction, refused by the trial court, that stated a conspiracy to commit a felony is only a misdemeanor if the conspirators do not commit the felony. The proffered instruction followed the language of Ark. Stat. Ann. §41-1201 (Repl. 1964). Appellant now contends that the refusal to give this instruction was error, since appellant's "defense in part to the charge filed against her by the State concerned her withdrawal from any conspiracy prior to the death of her husband.

The trial court correctly refused the instruction. In its interpretation of the statute that is now codified as §41-1201, on which appellant relies for this instruction, this Court held that the statute makes a conspiracy a prosecutable misdemeanor *only* when the object of the conspiracy is not accomplished. When the purpose of the conspiracy is achieved — as it was in the instant case — then the conspiracy is merged in the greater offense, and §41-1201 becomes inapplicable. *Elsey v. State,* 47 Ark. 572, 2 S.W. 337. Appellant's requested instruction was, therefore, an incorrect statement of the law with regard to the facts of this case, and the trial court committed no error by rejecting it.

It is next urged that since the office of State Police Sergeant Carroll Page at the Howard County jail was "bugged", appellant was denied privileged and confidential communications with her attorneys.

Before the trial, appellant's counsel discovered a hidden microphone leading to a recording device in a desk in a room at the Howard County jail. In this room appellant and counsel had held several conferences. Appellant moved to dismiss the information against her, alleging that the illegal electronic surveillance vitiated all criminal pro-

ceedings to that point. At a hearing on this motion, Sergeant Carroll Page, who owned the equipment, testified that he used it solely to record statements from victims and witnesses who might be afraid to talk before an open recorder; Page also stated that the equipment had never been used in connection with appellant's case. Moreover, appellant's counsel admitted that no one forced him to use the room in which the equipment was located; that the machine was not in operation when he discovered it, and that he had no evidence that it had ever been used to record a conference between him and appellant. Actually, it is not contended that any conversations were "bugged". At any rate, the record contains not one scintilla of evidence that any type of electronic surveillance was ever conducted in this case. Accordingly, appellant's contention that she was denied privileged and confidential communications with her attorneys is without merit.

Finally, it is vigorously urged that the State made deals with Bean and Lumpkin, and refused to disclose same at appellant's trial, which was "illegally prejudicial."

It might first be stated that Lumpkin is not even mentioned in appellant's argument at all, and there are no facts in the record which could, in any way, support such an allegation. The argument is all directed to a so-called "deal" with Bean. While appellant argues that there was a "deal" which was not disclosed to the jury, the record is contrary to such an assertion. Bean testified that he had been told by the prosecuting attorney that if he testified in behalf of the State, this fact would be taken into consideration, but he was also told that under no circumstances would the prosecutor ever recommend that he receive less than life imprisonment. The witness also emphatically stated that he had never been promised that he would not

be sent to the electric chair. The transcript contains five and one-half pages relating to this matter, including statements by counsel for the defense and the State, and a vigorous cross-examination of the witness by appellant's attorney. *The entire proceeding took place in front of the jury*, so there certainly is nothing to the argument that the jury was not informed of any inducements made to Bean. As already stated, the only actual inducement appearing in the record is that Bean was told that his willingness to testify would be taken into consideration. Of course, the credibility of a witness is a matter for the jury to pass upon, and since the jury heard the entire discussion and testimony relating to a so-called "deal", we can see no possible prejudice.

Appellant filed notice of appeal, and 41 days (according to appellant) after Mrs. Zachry's conviction, Bean pleaded guilty to first degree murder and was sentenced to life imprisonment. Thereafter, appellant filed a motion with this Court asking that a supplemental record of the proceedings held on the day Bean pleaded guilty be ordered included in the transcript on his appeal. We denied this motion, but granted an alternate motion for appellant to file an out-of-time motion for a new trial. This motion was denied and such denial of this motion is also included in this appeal.

After reviewing the proceedings of the sentencing of Bean, we agree with the trial court that there is "nothing inconsistent between the transcript filed in this [main] case and the [transcript of] sentencing of Charles Watson Bean." That is, there is nothing to substantiate appellant's contention that Bean, at the time he testified, had been promised that the death penalty would not be sought, or that he would receive no more than life imprisonment.

This Court observed, in *McDonald v. State,* 249 Ark. 506, 459 S.W. 2d 806, that an inducement to testify, even if one is shown, "does not affect the competency of [the witness's] testimony, for we have held that it goes only to the witness's credibility." The federal courts have reached the same result. In *United States v. Vida,* 370 F. 2d 759 (6th Cir.), *cert. denied,* 387 U.S. 910, a similar argument was rejected when the Court stated that it was not impressed with the contention "that the use of the testimony of an unsentenced accomplice deprives one who stands trial of due process or fair treatment. [Citations omitted.] We find no disagreement with the text that 'the fact that a witness hopes or expects that he will secure a mitigation of his own punishment by testifying on behalf of the prosecution does not disqualify him.' " See also *United States v. Brill,* 350 F. 2d 171 (2d Cir.), *cert. denied,* 382 U.S. 973. In the words of the United States Supreme Court, in *Lisenba v. California,* 314 U.S. 219, "[t]here is no adequate showing that there was a corrupt bargain with [the witness], and the practice of taking into consideration, in sentencing an accomplice, his aid to the State in turning State's evidence can be no denial of due process to a convicted confederate."

As already set out, the jury heard every contention relative to a "deal" advanced by appellant at the time of trial and apparently concluded that the assurance given to Bean that the fact he testified would be given consideration, did not impair his credibility.

We have also examined the record for every objection made, and find no reversible error.

Affirmed.

Fogleman, J., Concurs.